Case No. S246214

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHRISTOPHER GARDNER,

Petitioner,

v.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,

Respondent.

THE PEOPLE,

Real Party in Interest

APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT, THE CALIFORNIA INNOCENCE PROJECT, THE PROJECT FOR THE INNOCENT AT LOYOLA LAW SCHOOL, THE NORTHERN CALIFORNIA INNOCENCE PROJECT, THE UNIVERSITY OF SAN FRANCISCO CRIMINAL & JUVENILE JUSTICE CLINIC, THE AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW CRIMINAL JUSTICE CLINIC, PROFESSOR LARA BAZELON, AND PROFESSOR JENNY ROBERTS

O'MELVENY & MYERS LLP

BRETT J. WILLIAMSON (S.B. 145235)
BWILLIAMSON@OMM.COM
RYAN W. RUTLEDGE (S.B. 222642)
RRUTLEDGE@OMM.COM
610 NEWPORT CENTER DRIVE,
17TH FLOOR
NEWPORT BEACH, CALIFORNIA 92660
TELEPHONE: (949) 823-6900

M. CHRIS FABRICANT*
(*NOT ADMITTED IN CALIFORNIA)
INNOCENCE PROJECT, INC.
40 WORTH ST., SUITE 701
NEW YORK, NY 11013

Attorneys for Amici Curiae

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RRUTLEDGE@OMM.COM
610 NEWPORT CENTER DRIVE,
17TH FLOOR
NEWPORT BEACH, CALIFORNIA 92660
TELEPHONE: (949) 823-6900

M. CHRIS FABRICANT*
(*NOT ADMITTED IN CALIFORNIA)
INNOCENCE PROJECT, INC.
40 WORTH ST., SUITE 701
NEW YORK, NY 11013

Attorneys for Amici Curiae

APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF

The Innocence Project, its local affiliates, and like-minded academics urge the Court to grant the relief sought in the Writ Petition. Defendants who have been charged with a crime—including misdemeanors—have a Sixth Amendment right to counsel on an interlocutory appeal by the prosecutor. In holding otherwise, the Court of Appeal created an unprecedented, unconstitutional gap in the time during which a defendant has a well-established right to counsel: from the time the defendant is charged until those charges are resolved by a judgment on appeal.

Proposed *amici* are the Innocence Project, the California Innocence Project, the Project for the Innocent, at Loyola Law School, and the Northern California Innocence Project (collectively, the "innocence organizations"), the University of San Francisco Criminal & Juvenile Justice Clinic, the American University Washington College of Law Criminal Justice Clinic (collectively, the "Clinics") and Professors Lara Bazelon and Jenny Roberts. The innocence organizations are each affiliated with the Innocence Network, whose members provide pro bono legal and investigative services to wrongly convicted individuals seeking to prove their innocence. The Network represents hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. The Network also seeks to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Bazelon and Roberts are two of the leading academic researchers regarding these issues. The Clinics provide pro bono assistance to individuals charged in state court

with misdemeanor crimes; the USF Clinic represents indigent clients in San Francisco Superior Court.

The right to counsel is of critical importance to innocent defendants. Qualified legal advocates are all that stands between an innocent defendant and a wrongful conviction. Perversely, however, the Court of Appeal's decision in this case provides that the right to counsel on appeals only extends to defendants who have already been adjudicated as guilty. In the Court of Appeal's view, defendants who are still on trial—and who are, of course, presumed innocent unless and until proven guilty—can be deprived of counsel when they need it most.

The Court of Appeal's decision creates an inevitable risk of more wrongful convictions, which is anathema to the institutional mission of the innocence organizations and to the Clinics, which exist to ensure that every client facing a criminal conviction receives the legal representation guaranteed by the Sixth Amendment. Because of these interests, *amici* respectfully request that this Court allow them to submit this brief addressing this constitutional issue. *See* Rule of Ct. 8.520(f).

No person or entity other than *amici* and their counsel authored the attached brief or made any monetary contribution to its preparation.

Dated: June 20, 2018

Respectfully submitted,

O'MELVENY & MYERS LLP
BRETT J. WILLIAMSON
RYAN W. RUTLEDGE

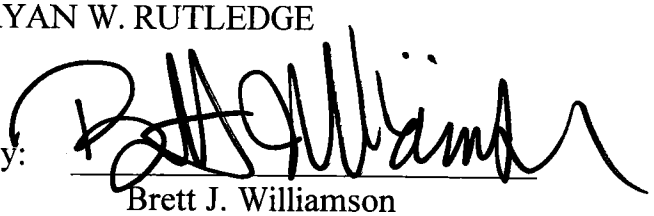
By: 
Brett J. Williamson
Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

Constitutional Provisions

INTRODUCTION

"You have the right to an attorney *after you are convicted.*" It sounds like a satirical perversion of the *Miranda* warning from a work of dystopian fiction. But it is the actual holding of the Court of Appeal in this case. Because it is inconsistent with the Constitution, American values, and our traditional concept of justice, the decision below should be reversed.

According to the Court of Appeal, California Rule of Court 8.851(a)(1) "provides that an appellate division 'must appoint appellate counsel for a defendant *convicted of a misdemeanor*'"[1] but a defendant who has been *charged* with a misdemeanor, though not (yet) convicted, is not entitled to appellate counsel under the Rule. Such a holding deprives misdemeanor defendants of the constitutional right to an attorney at the time when they need it most: before they are convicted.

At the outset, the fact that a case involves misdemeanor charges cannot justify depriving the defendant of a clear right to counsel. The Supreme Court has recognized that "the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result."[2] That pressure to cut corners, however, poses grave dangers for misdemeanor defendants—especially innocent ones. Defendants convicted of misdemeanors can still face substantial jail time. Moreover, even defendants who receive non-jail sentences will face life-long collateral consequences from a conviction, which may include substantial difficulty finding employment and housing due to background checks, deportation, sex offender registration, and loss of student loans. In recognition of the

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[1] *Morris v. Superior Court*, 17 Cal. App. 5th 636, 642 (2017) (emphasis in original).

[2] *Argersinger v. Hamlin*, 407 U.S. 25, 34-35 (1972) (footnote omitted).

significance of a misdemeanor conviction, the Supreme Court long ago held that the Sixth Amendment right to counsel in cases involving an imposed or suspended sentence of incarceration.

Indeed, the line drawn by the Court of Appeal in this case is not between felony and misdemeanor charges, but between defendants who have been convicted and those who have not. Yet the need for an attorney is not exclusive to those who have already been convicted. Effective assistance of counsel is critical for innocent defendants to avoid wrongful conviction in the first instance, and that assistance obviously must be rendered before the wrongful conviction occurs. It plainly is insufficient to appoint counsel at the sentencing stage, after a defendant has already been found guilty. Yet the Court of Appeal holds that a misdemeanor defendant's right to counsel on appeal is limited to post-conviction appeals by the defendant—and does not extend to pre-trial appeals by the prosecutor.[3]

Contrary to the Court of Appeal's interpretation of the Sixth Amendment, the right to counsel in criminal proceedings applies at all critical stages leading up the judgment—including a pre-conviction appeal by the prosecutor. Issues regarding the admissibility of evidence, including evidence known to lead to wrongful conviction when unreliable or misapplied, such as the eyewitness identification, confession evidence, and expert testimony (to name a few) are all routinely decided in pre-trial hearings.[4] There is no question that a criminal defendant has the right to

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[3] *Morris*, 17 Cal. App. 5th at 647.

[4] Eyewitness misidentification, false confessions and the misapplication of forensic science are the three leading causes of wrongful convictions, of those overturned though post-conviction DNA testing. *See The Causes of Wrongful Conviction*, Innocence Project, *available at https*://www.innocenceproject.org/causes-wrongful-conviction./ (last visited June 18, 2018).

counsel in such pre-trial proceedings. Even the Court of Appeal does not appear to dispute that such a right exists—though its reasoning cannot be reconciled with that right's existence. Instead, the Court of Appeal holds that, if the defendant prevails in a pre-trial hearing while represented by counsel at the trial court level, the prosecutor is entitled to an appeal at which the defendant is not represented by counsel. The holding would detach a constitutional right guaranteed at critical stages and then paste it back on again after the defendant, pro se, loses on appeal and returns to be retried. Contrary to the Court of Appeal's holding, there is no such "gap" in the pre-trial right to counsel for pre-conviction appeals by the prosecutor.

Criminal defendants are entitled to counsel, at a minimum, from the time of their first appearance through the time of trial—a timeframe that includes pre-trial appeals by the prosecutor. The Court of Appeal's error in this case stems from its reliance on decisions holding that there is no right to counsel in certain post-conviction appeals by the defendant, which it misapplies as authority for its novel ruling that there is no right to counsel in *pre-trial* appeals by the prosecutor. Those are two very different stages in criminal litigation.

The Court of Appeal distinguished between trial and appellate stages of criminal proceedings by stating that "the purpose of the trial court portion of the action is to give the state a forum in which to attempt to overcome the presumption of innocence, while an appeal is usually initiated by a convicted defendant who needs counsel not to protect against being haled into court but to overturn a determination of guilt."[5] Yet the Court of Appeal was so myopically focused on the "usual" appeal (a post-conviction appeal by the defendant) that it failed to recognize that *this* appeal (a pre-conviction appeal by the prosecutor) shares the same purpose as any other

[5] *Morris*, 17 Cal. App. 5th at 648.

pre-trial proceeding: the state is attempting to get a second shot at a defendant entitled to the presumption of innocence by convincing an appellate court that it should be allowed to introduce evidence that the trial judge found so tainted or unreliable as to be inadmissible. These are high stakes.

Accordingly, *Amici* respectfully submit that the Court of Appeal's decision should be reversed, and that this Court should answer in the affirmative the question on which it granted review: indigent misdemeanor defendants have a right to counsel on appeal by the prosecution. Any other holding poses too great a risk of wrongful conviction of criminal defendants by depriving them of the assistance of counsel at a critical stage of the proceedings against them.

ARGUMENT

I. EFFECTIVE ASSISTANCE OF COUNSEL AT ALL STAGES OF PROSECUTION—INCLUDING A PRE-TRIAL APPEAL BY THE PROSECUTOR—IS CRITICAL TO AVOIDING WRONGFUL CONVICTION.

This Court has recognized that "[t]he right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of our constitutional rights."[6] In any case presenting novel legal questions regarding the scope of that right, like this one, the Court must consider the unparalleled importance of the interest that is at stake—and the consequences of a ruling that would deprive anyone of a right that is sacred.

Perhaps the most significant consequence of depriving a criminal defendant of the right to counsel (and the reason that many of the *amici* exist as institutions) is the wrongful conviction of defendants who are factually innocent. No one—regardless of political persuasion or viewpoint on the criminal justice system in general—wants to see innocent people go

[6] *People v. Ortiz*, 51 Cal. 3d 975, 982 (1990).

to jail. When an innocent person is convicted, it often means that a guilty person goes free. And when an innocent person is convicted, it always means devastating consequences for someone who does not deserve them.

Opposing wrongful convictions is easy; preventing wrongful convictions is much harder. Numerous private and governmental institutions and individuals (including but certainly not limited to *amici*) have studied the causes of wrongful convictions that have occurred in the past in an attempt to prevent them from continuing to occur in the future. There is remarkable consensus regarding at least one reason why innocent people have been wrongfully convicted: they did not have effective legal representation. "Although there undoubtedly are a variety of causes of wrongful conviction . . . inadequate representation often is cited as a significant contributing factor."[7]

The importance of counsel in avoiding wrongful conviction should come as no surprise. The Supreme Court has repeatedly acknowledged that "representation by counsel 'is critical to the ability of the adversarial system to produce just results.'"[8] This Court has similarly recognized that "[t]he right to counsel of choice is one of the constitutional rights most basic to a fair trial."[9] These principles, justice and fairness, are the most fundamental cornerstones of our legal system. There is nothing just about convicting the innocent of crimes they did not commit—and nothing fair about a procedure that results in wrongful convictions due to the deprivation of counsel. "Indeed, concern about the injustice that results

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[7] *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, A.B.A. Standing Comm. on Legal Aid & Indigent Defs., at 3 (Dec. 2004), *available at* https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

[8] *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)).

[9] *Ortiz*, 51 Cal. 3d at 988.

from the conviction of an innocent person has long been at the core of our criminal justice system."[10]

The risk of wrongful conviction is heightened for any defendant not represented by counsel. In the case of indigent defendants, who cannot afford to retain counsel, the risk of wrongful conviction is embedded in any procedure that denies appointed counsel to them. According to the American Bar Association—an organization that includes judges, prosecutors, and defense counsel—"indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction."[11]

If one of the primary causes of wrongful conviction is lack of access to effective legal representation, then the first part of the solution to that problem is apparent: ensuring a robust right to counsel. As the United States Department of Justice described, "[t]here are many ways innocent people are pulled into the criminal justice system . . . but there is one principal way that innocent people can be extricated from the system: through the effective assistance of counsel."[12] A defendant "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[13]

This Court has recognized that "[t]he right to counsel . . . insur[es] the reliability of the guilt-determining process by reducing to a minimum

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[10] *Schlup v. Delo*, 513 U.S. 298, 325 (1995).
[11] *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, *supra* n. 7, at 38.
[12] *Nat'l Symposium on Indigent Defense 2000: Redefining Leadership for Equal Justice*, Office of Justice Programs, U.S. Dep't of Justice, at xiv (2000), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/187491NCJRS.pdf.
[13] *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

the possibility that an innocent person will be punished."[14] It has also held that "[w]e would be the last court to diminish the importance of the right to counsel."[15] *Amici* respectfully request that the Court keep that promise in this case by holding, contrary to the Court of Appeal, that indigent criminal defendants in misdemeanor cases have the right to counsel on a pre-trial appeal by the prosecutor.

A. Pre-Trial Appeals By The Prosecutor Are A "Critical Stage" Of The Proceedings Against A Criminal Defendant Because They Have Significant Consequences.

This Court granted review to address the question: "Is the Appellate Division of the Superior Court required to appoint counsel for an indigent defendant charged with a misdemeanor offense on an appeal by the prosecution?" Although this appears to be a novel question, there is a settled legal framework in which to consider it—and it is a framework that is not addressed anywhere in the Court of Appeal's decision.

As this Court has recognized, "[a] criminal defendant enjoys the right to counsel under both the state and federal Constitutions."[16] Petitioner in this case correctly notes that the right to counsel exists at all "critical stages" of the prosecution, and Petitioner cites decisions of intermediate courts dealing specifically with an appeal by the prosecutor constituting such a critical stage. *Amici* wholeheartedly agree, but they write separately to share their own perspectives—as individuals and organizations that have studied the causes and remedies of wrongful conviction—why a pre-trial appeal is so "critical."

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[14] *Ortiz*, 51 Cal. 3d at 988.
[15] *People v. Sumstine*, 36 Cal. 3d 909, 918 (1984).
[16] *People v. Streeter*, 54 Cal. 4th 205, 232 (2012) (citing U.S. Const. amend. VI; Cal. Const., art. I, § 15; *Gideon v. Wainwright*, 372 U.S. 335, 339-345 (1963); *People v. Koontz*, 27 Cal. 4th 1041, 1069 (2002) (quotations omitted)).

Almost a century ago, in *Powell v. Alabama*, the Supreme Court held that criminal defendants have a right to counsel "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial."[17] The Supreme Court "has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty."[18] Over the decades following *Powell*, the Supreme Court held that the right to counsel sometimes extends beyond this "most critical period."[19] At a minimum, however, the timeframe between first appearance and trial has always been understood as one in which the right to counsel exists.

Within the timeframe between first appearance and trial, the Supreme Court has held that the right to counsel extends to all "critical stages" of the proceedings. "The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends, as noted, upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.'"[20]

This Court has previously considered what the phrase "critical stage" means: something that has "significant consequences." As this Court stated: "The Supreme Court has explained that the phrase '"a critical stage"' was used in *Cronic* 'to denote a step of a criminal proceeding, such

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[17] *Powell*, 287 U.S. at 57.
[18] *Rothgery v. Gillespie County, Tex.*, 554 U.S 191, 194 (2008).
[19] *Alabama v. Shelton*, 535 U.S. 654, 662, 674 (2002).
[20] *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)).

as arraignment, that held significant consequences for the accused.'"[21] Since then, the Supreme Court has reaffirmed that "a 'critical stage' [i]s one that 'held significant consequences for the accused.'"[22]

The Court of Appeal's decision does not address any of the decisions of this Court or of the Supreme Court of the United States in which this standard—"significant consequences"—has been applied to determine whether the defendant has a right to counsel. Instead, the Court of Appeal found the Sixth Amendment to be categorically inapplicable to appellate proceedings, relying on *Martinez v. Court of Appeal*,[23] which explained that "[a]ppeals as of right in federal courts were nonexistent for the first century of our Nation, and appellate review of any sort was 'rarely allowed.'"[24] That is true but irrelevant: there are many aspects of modern criminal prosecutions that did not exist two hundred years ago, for which there is now a clear right to counsel.

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.[25]

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[21] *People v. Hernandez*, 53 Cal. 4th 1095, 1106 (2012) (citing *Bell v. Cone*, 535 U.S. 685, 696 (2002)).
[22] *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quoting *Bell* 535 U.S. at 696.
[23] *Morris*, 17 Cal. App. 5th at 645.
[24] *Martinez v. Court of Appeal*, 528 U.S. 152, 159 (2000).
[25] *Wade*, 388 U.S. at 224 (footnote omitted).

What matters under the Supreme Court's decisions with respect to the right to counsel, once a new procedure is created within the context of a criminal prosecution, is whether that new procedure has become a critical stage of the proceedings by having significant consequences for the accused. In *Coleman*, for example, the question presented to the Supreme Court was whether a "preliminary hearing" was a "critical stage" of the proceeding. Like appeals, preliminary hearings were not always a part of criminal proceedings, and the Supreme Court even noted that "[t]he preliminary hearing is not a required step in an Alabama prosecution."[26] Yet the Supreme Court held that, when preliminary hearings are used, "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution."[27] That same principle applies to pre-trial appeals by the prosecution.

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.[28]

In sum, the crux of the question is whether a pre-trial appeal by the prosecutor has "significant consequences" for the accused. It plainly does. In this case, for example, the charges against Lopez have been dismissed pending the government's appeal, and she retains the presumption of innocence while the prosecutor pursues the appeal.[29] The outcome of that

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[26] 339 U.S. at 8
[27] *Id.* at 9
[28] *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).
[29] *Morris*, 17 Cal. App. 5th at 641.

appeal means the difference for Lopez between standing trial and risking criminal sanctions, on the one hand, and the termination of the proceedings, on the other. It is difficult to imagine more significant consequences than those. "Indeed, over the past several decades the Supreme Court has increasingly emphasized that our elaborate system for appeals is intended to guard against wrongful conviction of the innocent. Appellate review is thus considered the system's failsafe against wrongful conviction. In this sense, the appellate process is an essential part of the justice system's apparatus for finding the truth."[30]

The Supreme Court has previously recognized this Court's opinions as leading the way on the right of indigent defendants to counsel on appeal, stating: "We agree, however, with Justice Traynor of the California Supreme Court, who said that the '(d)enial of counsel on appeal (to an indigent) would seem to be a discrimination at least as invidious as that condemned in *Griffin v. People of State of Illinois*.'"[31] *Amici* respectfully request that this Court continue in that tradition by recognizing a right to counsel in this case.

B. Unrepresented Defendants Cannot Reasonably Be Expected To Effectively Represent Themselves During Pre-Trial Appeals By The Prosecutor.

A pre-trial appeal by the prosecutor is not just a critical stage of the case against a criminal defendant, it is also a stage at which it is particularly critical that a criminal defendant—a defendant who has not been convicted and indeed still retains the presumption of innocence—be represented by counsel. Without representation by a trained attorney, a layperson

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[30] Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591, 591–92 (2009)

[31] *Douglas v. California*, 372 U.S. 353, 355 (1963). In *Griffin*, the Supreme Court held that, in order to pursue an appeal, an indigent defendant has a right to a copy of the trial court record, regardless of ability to pay.

defendant is unlikely to muster all of the legal arguments that could mean the difference between continued prosecution and the dismissal of the case.

"The United States Supreme Court has recognized that the complexities involved in defending oneself in a criminal trial are beyond the capabilities of the average layman untrained in the laws."[32] This is a problem of Constitutional proportions because "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and . . . a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."[33] Without access to counsel, even innocent defendants risk being convicted simply because they are unable to identify and articulate the arguments demonstrating the flaws in the prosecution's case.

The Court of Appeal's decision in this case treats pre-trial appeals by the prosecutor differently than pre-trial court proceedings—pretending that a layperson who concededly needs (and is constitutionally entitled to) defense counsel in the trial court can nevertheless provide effective self-representation on appeal. That pretense is contrary to both logic and legal authority. As the Supreme Court has explained, "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."[34] "An unrepresented appellant-like an unrepresented defendant at trial-is unable to protect the vital interests at stake."[35]

The Court of Appeal in this case cites *Gideon v. Wainwright* in support of its statement that "the absence of counsel is not always fatal to a

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[32] *Gordon v. Justice Court*, 12 Cal. 3d 323, 332 (1974).
[33] *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).
[34] *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).
[35] *Id.* at 396.

claim on appeal; we note the litigant in the landmark case who caused the United States Supreme Court to hold that all indigent criminal defendants have the right to appointed counsel, was himself without counsel for the majority of that proceeding."[36] The Court of Appeal's citation of *Gideon* is ironic and borders on cruel. It was in *Gideon* that the Supreme Court held that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[37] The Court of Appeal's note that Gideon was unrepresented for "the majority" of his case is specious, since he was represented by counsel when it mattered most: *on appeal.* (Abe Fortas, who became an Associate Justice two years later, represented Gideon in the critical appellate proceedings before the Supreme Court).[38]

The Court of Appeal's reliance on *Gideon* for the proposition that in many contexts lawyers are unnecessary is misplaced. To the contrary, the Supreme Court has construed *Gideon* as "rest[ing] on the 'obvious truth' that lawyers are 'necessities, not luxuries' in our adversarial system of criminal justice."[39] "The defendant's liberty depends on his ability to present his case in the face of 'the intricacies of the law and the advocacy of the public prosecutor,'; a criminal trial is thus not conducted in accord with due process of law unless the defendant has counsel to represent him."[40]

These are not merely abstract principles; they reflect a practical reality that, given the complexity of modern legal proceedings and the need for extensive training and experience to navigate it, laypersons are simply unequipped to represent their interests effectively. In this case, for

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[36] *Morris*, 17 Cal. App. 5th at 640, n.1.
[37] *Gideon*, 372 U.S. at 344.
[38] *Id.* at 335.
[39] *Evitts*, 469 U.S. at 394.
[40] *Id.* (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)).

example, Ms. Lopez's attorney prevailed in the trial court on a motion to suppress evidence under California Penal Code § 1538.5, which provides for the suppression of evidence obtained through unreasonable searches and seizures. The prosecutor's pre-trial appeal will decide—with greater finality than the trial court's suppression order—whether such evidence may be admitted against her at trial. To effectively argue that appeal, Ms. Lopez presumably would need to be versed in jurisprudence under the Fourth Amendment and Article 1, Section 13 of the California Constitution—a complicated and nuanced subject for a layperson, to say the least. In one recent federal case, for example, a court denied a motion to suppress evidence simply because "[t]he issue of whether suppression of evidence is appropriate, or whether any statements were elicited in violation of applicable constitutional laws is a complex one, and Defendant's conclusory arguments and incomplete analysis of this complex problem is inadequate."[41] Yet it is precisely that type of argument that is to be expected from an unrepresented party, who could hardly be expected to do any better. It is indisputable that "Fourth Amendment jurisprudence is complicated and voluminous."[42]

Yet the difficulties that Ms. Lopez faces in mastering the Fourth Amendment for purposes of her appeal are only the tip of the iceberg in terms of the complexity of the subjects that may be addressed in a pre-trial appeal by a prosecutor, for which counsel is essential.

One of the leading causes of wrongful conviction is the use of faulty forensic evidence.[43] "One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid

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[41] *United States v. Guerrier*, No. 16-CR-cr-33, 2017 U.S. Dist. LEXIS 14405, at *13 (M.D. Pa. Feb. 2, 2017).
[42] *Id.*
[43] Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 81 (2008).

forensic testimony contributed to the convictions in 60% of the cases."[44] That led the Supreme Court to conclude that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials."[45] Yet laypersons cannot reasonably be expected to understand complex forensic science, identify defects in the application of the science or in the science itself, and explain those defects to the court on appeal.

Another cause of wrongful conviction is eyewitness identification.[46] Eyewitness identification presents a host of issues that laypersons are unlikely to grasp, including not only the reliability of the identification, but also whether the identification was suggestive (because the police indicated the identity of their suspect to the eyewitness), whether the suggestion was the product of police conduct (because the identification procedure, such as a lineup, was manufactured by the police), whether the defendant had a right to counsel at a pre-trial lineup (which requires more familiarity with legal precedent), and whether the identification can be challenged for indirect reasons (such as ineffective assistance of counsel or because of faulty jury instructions).[47]

Finally, perhaps one of the most troubling issues for which appellate counsel is most essential is the issue of false confessions. Confessions can be particularly persuasive evidence of guilt, but "DNA evidence tells us"

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[44] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009).
[45] *Id.*
[46] Garrett, *supra* n.43, at 78.
[47] *See id.* at 80-81. For example, in *Perry v. New Hampshire*, 565 U.S. 228, 233 (2012), the Supreme Court held that a threshold question in determining whether an identification is admissible is whether "improper law enforcement activity is involved." Whether law enforcement activity is "improper," however, requires a detailed understanding of legal precedent and principles, and is not an inquiry that a layperson can reasonably be expected to address in a competent manner.

that some confessions are false.[48] If a criminal defendant has been coerced, tricked, or otherwise induced into making a false confession, that already indicates that that particular defendant has been unable to protect his or her own interests without the representation of counsel. There is little reason to believe that the defendant will be able to do any better without representation on appeal. And there are strong reasons to believe that such a system will deprive defendants of a fair hearing: legal counsel is the check and balance on the conduct of the prosecution.

In this case, the Court of Appeal suggests an alternative check: that in an appeal by the prosecutor, the defendant "will reap the benefit of standards of review and other procedural tools that are designed to protect the ruling the trial court has already made."[49] The problem, in the case of false confessions, is that there has already been a breakdown in the procedural rules designed to protect the fairness of the proceedings. Courts that rely on confessions have "often highlighted in their opinions the corroborated nonpublic details that made these confessions appear to be particularly credible," but when DNA evidence later proves that the confessions were false, it also proves that defendants "could not have, 'without prompting,' offered accurate and nonpublic details in their confessions."[50] "Thus, in some cases DNA proves not only that the defendant was innocent, but also that police fed facts, asked leading questions, supplied details, and . . . lied later about what happened and claimed that the suspect offered the details 'without prompting.'"[51]

Obviously, prompting criminal defendants to give false confessions should not happen. The safeguard to prevent them, however, is not simply

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[48] Garrett, *supra* n.43, at 89.
[49] *Morris*, 17 Cal. App. 5th at 651.
[50] Garrett, *supra* n.43, at 89.
[51] *Id.* at 89-90.

reliance on criminal procedures—it is the right to counsel. The same is true here. Appellate courts should not simply credit the arguments made by a prosecutor in a pre-trial appeal. But the safeguard to prevent that from happening cannot just be the courts' review of the prosecutors' arguments. It must be the appointment of counsel to represent the defendant, so that the courts can make an informed review of the arguments from both sides. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[52]

C. Many Unrepresented Defendants (Including The One In This Case) Face Burdens In Representing Themselves Beyond The Lack Of Legal Training.

The Supreme Court has held that the right to counsel—specifically including the right to counsel on appeal—must take into consideration the multitude of reasons why individuals are incapable of effectively representing themselves: "Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments."[53]

For example, in one report, the Department of Justice found that "more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in State prisons, 78,800 in Federal prisons, and 479,900 in local jails."[54] The large number of individuals in local jails, coupled with express findings by the Department of Justice regarding the number of inmates with mental health problems whose most serious crimes

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[52] *Herring v. New York*, 422 U.S. 853, 862 (1975).
[53] *Halbert v. Michigan*, 545 U.S. 605, 621 (2005).
[54] Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics, U.S. Dep't of Justice, at 1 (2006), *available at* https://www.bjs.gov/content/pub/pdf/mhppji.pdf.

were larceny, drug possession, or DUI,[55] make clear that mental health issues are prevalent even among misdemeanor defendants.

Similarly, "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'"[56] Nearly a quarter of California's population is under 18 years of age.[57] That is nearly ten million minors whom, the Supreme Court has held, need the assistance of counsel.

The special difficulties of certain populations in representing themselves in legal proceedings are not merely hypothetical concerns, as the facts of this case demonstrate. As the Court of Appeal notes, Lopez's petition described that "Lopez does not . . . speak English" and, "other than being able to perform rudimentary tasks such as dating documents and printing her name, she does not read or write English."[58] And Lopez is not alone. According to the most recent census, there are more than 15 million individuals in California who speak a language other than English at home.[59] Of those, 8.4 percent—more than one and a quarter million people—do not speak English at all.[60] Another 16.6 percent—more than

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[55] *Id.* at 7.
[56] *In re Gault*, 387 U.S. 1, 36 (1967) (quoting *Powell*, 287 U.S. at 69) (footnote omitted).
[57] *Quick Facts*, United States Census Bureau, *available at* https://www.census.gov/quickfacts/fact/table/CA/AGE295216#viewtop.
[58] *Morris*, 17 Cal. App. 4th at 651.
[59] Camille Ryan, *Language Use in the United States: 2011*, U.S. Census Bureau, at 11 (Aug. 2013), *available at* https://www.census.gov/prod/2013pubs/acs-22.pdf.
[60] *Id.*

two and a half million people—do not speak English well.[61] Out of a population of thirty-five million people, that is more than ten percent of people living in California who have limited or no ability to speak English—and who cannot reasonably be expected to represent themselves in appellate criminal proceedings that are conducted in a language that they do not understand.

As the statistics demonstrate, these disadvantages are so prevalent that, when taken as a whole, it may be more unusual for a defendant to have no disadvantages than for a defendant to have one or more special difficulties in self-representation. The problem is so endemic that assessing these disadvantages on a case-by-case basis would be unworkable. And it would ultimately be futile. "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad."[62] It is for precisely that reason that *all* criminal defendants have a right to counsel—even educated, English-speaking adults with no mental disabilities. The fact that so many criminal defendants lack even those advantages reinforces the conclusion that all misdemeanor defendants are entitled to counsel on an appeal by the prosecutor.

II. WRONGFUL MISDEMEANOR CONVICTIONS POSE SUBSTANTIAL THREATS TO INNOCENT DEFENDANTS.

The question on which this Court granted review specifically identifies misdemeanor offenses, and it is fair to consider whether the principles addressed above—many of which derive from cases involving felonies—apply in the misdemeanor context. They do. While misdemeanor offenses are less serious crimes than felonies, the consequences of a misdemeanor conviction can be extremely serious. In

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[61] *Id.*

[62] *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

view of that seriousness, Sixth Amendment protections extend to misdemeanor defendants, and as such this Court should hold that there is a right to counsel on appeal by the prosecutor in misdemeanor cases.

A. A Misdemeanor Conviction Can Have Long-Lasting, Life-Altering Consequences That Extend Far Beyond Possible Incarceration

As Justice Powell observed, "[t]he consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'"[63] In the decades since that observation, the consequences of misdemeanor convictions have dramatically increased in number and severity. "[T]he world of criminal justice has changed in two important respects in the last thirty years. First, the advent and spread of zero-tolerance policing and prosecution has drawn a far higher percentage of people into the criminal justice system. Second, the scope, severity, and ubiquity of the collateral consequences of a misdemeanor conviction have dramatically increased."[64] Thus, even if misdemeanors were once thought to be relatively inconsequential crimes, the consequences of misdemeanor convictions are so serious now that the right to counsel is imperative to prevent devastating punishment from being inflicted on innocent defendants.

The term "collateral consequences" refers to consequences that result from a conviction, but that are not a direct part of the sentence of punishment imposed by the court. Collateral consequences can include "civil sanctions such as forfeitures, deportation, disqualification to receive

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[63] *Argersinger*, 407 U.S. at 47–48 (Powell, J., Concurring).
[64] John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 Harv. C.R.-C.L. L. Rev. 1, 2 (2013) (footnotes omitted).

government benefits, and the like."[65] Because these collateral consequences can result from either a felony or a misdemeanor, "[t]his has also diminished the significance of the distinction between pleading guilty to a felony or a misdemeanor, as the latter may also carry significant future consequences for the defendant."[66] "The American Bar Association currently estimates 44,000 state and federal collateral consequences of conviction exist nationwide. This does not even begin to account for the civil consequences that attach only to arrests or for the discretionary consequences that may be triggered as a result of employer background checks."[67] As alarming as that number is, the exclusion of informal collateral consequences is a significant caveat.[68]

Arguably, one of the most significant consequences to a criminal conviction is the long-lasting negative impact that the conviction can have on an individual's ability to be hired for a job. "[C]riminal records are now widely available online—usually for free—and employers, landlords, and others are accessing this data for purposes they never would have considered if it still required a trip to the local courthouse. Relatedly, commercial data aggregators buy and sell criminal records for background checks and other uses."[69] Although records of criminal convictions have long been public, the vastly-superior ease of accessing those records in the age of the Internet makes it much easier, as a practical matter, for

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[65] ABA Criminal Justice Standards: Pleas of Guilty, at xi (3d ed. 1999), *available at* https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf.
[66] *Id.*
[67] Eisha Jain, *Prosecuting Collateral Consequences*, 104 Geo. L.J. 1197, 1206–07 (2016) (footnotes omitted).
[68] Wayne Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103 (2013).
[69] Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 Hofstra L. Rev. 171, 171–73 (2017)

employers to turn away applicants with any criminal record—including misdemeanors.

Non-discretionary collateral consequences of a misdemeanor conviction, in particular, can be of long-lasting significance. For example, California's Sex Offender Registration Act requires anyone convicted of any of the enumerated offenses to register with the local chief of police or sheriff "for the rest of his or her life while residing in California."[70] The enumerated offenses have a broad sweep. They include some of the most serious felonies imaginable, including murder committed in the course of rape.[71] They also include misdemeanors, such as contributing to the delinquency of a minor.[72] Being placed on a publicly-available list of sex offenders alongside individuals convicted of felony rape *for life* is a serious collateral consequence for anyone convicted of a misdemeanor.

Another serious collateral consequence of a misdemeanor conviction is possible deportation, for non-citizens. Under 8 U.S.C. § 1227(a)(2)(B)(i), "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." Individuals who sell large quantities of illegal narcotics are frequently charged with felonies. But many less serious crimes involving drugs—such as being under the influence or possessing

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[70] Cal. Penal Code § 290(b).

[71] *Id.* § 290(c) (including "[a]ny person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape.").

[72] *Id.* § 290(c) (including "any offense involving lewd or lascivious conduct under Section 272").

small quantities—are misdemeanors. The direct criminal punishment for such a misdemeanor conviction may be relatively limited, but the collateral consequence of deportation is a serious risk for misdemeanor defendants. Indeed, the Supreme Court has acknowledged that "[t]he 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes."[73]

The reality of these collateral consequences, especially when suffered by innocent defendants, is the definition of injustice. After all, misdemeanors are supposed to be "minor" crimes, at least relative to felonies. Yet consequences like long-term unemployability, lifetime sex-offender registration, and deportation cannot be considered minor in any way.

Regardless of whether such collateral consequences serve the interest of justice, there is no justification for imposing these severe collateral consequences on a criminal defendant *who did not actually commit any crime*. If a misdemeanor is enough to disqualify someone from holding a job, to require lifetime sex offender registration, or to deport someone to another country, fairness indisputably requires that innocent defendants not be convicted of misdemeanors that they did not commit. And, just as in the case of felony prosecutions, the assurance that misdemeanor defendants are not being wrongfully convicted begins with a robust right to counsel—including on any pre-trial appeal by the prosecutor.

B. The Right To Counsel Extends To Misdemeanor Cases And, Here, Should Be Extended To Appeals By The Prosecutor.

In view of the seriousness of the potential penalties for a misdemeanor conviction—including the loss of liberty through

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[73] *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (citation omitted).

incarceration, not to mention the collateral consequences discussed above—the Supreme Court has held that there is a Sixth Amendment right to counsel even in cases involving misdemeanors.

"*Gideon* was the start of a right to counsel revolution in the United States. Today, consistent with the Sixth Amendment to the U.S. Constitution, persons cannot be deprived of their liberty in state criminal or juvenile courts, *even if charged with minor offenses*, unless counsel has represented them or they have knowingly and intelligently relinquished their right to legal representation."[74]

Almost half a century ago, this Court observed: "The United States Supreme Court has recognized that the legal and constitutional issues involved in a misdemeanor case may be as complex as those involved in a trial for a more serious offense."[75] That is as true today as it was then. More so even. "Like felonies, misdemeanor cases raise issues of suppression in drug and weapons cases, expert testimony in drug, assault, and drunk driving cases, and *Crawford*/Confrontation Clause issues in domestic violence and other types of cases."[76]

As discussed above, unrepresented defendants cannot reasonably be expected to grasp the complexities of the legal issues that may be presented on an appeal by the prosecutor. That is as true with respect to misdemeanors as felonies. Indeed, there is an even greater risk that unrepresented defendants will be unable to protect their rights in the misdemeanor context. A defendant charged with murder, for example, might at least guess at how serious the punishment is, and be expected to

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[74] *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, *supra* n.7, at iv (emphasis added).
[75] *Gordon*, 12 Cal. 3d at 330.
[76] Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 303–04 (2011) (footnote omitted).

try as best as possible to avoid it. A defendant charged with misdemeanor drug possession, however, might never suspect the collateral consequence of possible deportation—and, as a result, may not even realize how important it is to exhaust every avenue of legal argument.

"We must conclude, therefore, that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial."[77] And in the case of indigent defendants, that requirement entails appointing counsel as a safeguard against wrongful conviction. "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence."[78] As the Supreme Court has held, "[t]he size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case."[79]

Failure to provide counsel to misdemeanor defendants all but guarantees an increase in the number of wrongful convictions—and unwarranted havoc in the lives of defendants who were actually innocent of any crime. "One study concluded that '[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.'"[80] In view of the seriousness of the direct and collateral consequences of a misdemeanor conviction, a 500% disparity in the outcomes of defendants based on their ability to pay for counsel is intolerable. The clear and Constitutionally-mandated solution to that

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[77] *Argersinger*, 407 U.S. at 36–37 (footnote omitted).
[78] *Griffin*, 351 U.S. at 17–18.
[79] *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971).
[80] *Argersinger*, 407 U.S. at 36 (citing American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970)) (alteration in original).

problem is to appoint counsel for misdemeanor defendants, like Lopez, in the event of an appeal by the prosecutor.

III. DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO COUNSEL ON AN APPEAL BY THE PROSECUTOR.

The Court of Appeal misapplied case law from another context to create a new legal principle that deprived Lopez of her constitutional right to counsel. Its decision is based on authorities holding that a defendant does not have a constitutional right to counsel on an appeal *by the defendant*, made *after* a judgment of conviction. But the question presented in this case is whether a defendant has a constitutional right to counsel on an appeal *by the prosecutor*, made *before* any judgment (of conviction or otherwise). Those are two fundamentally different issues. Because a pre-trial appeal by the prosecutor occurs between arraignment and trial, defendants have the same right to counsel as they did in the proceedings before the trial court that are the subject of the appeal.

By analogy to federal law, 18 U.S.C. § 3731 provides that the United States may appeal, among other things, orders dismissing indictments, granting new trials, suppressing or excluding evidence, or granting the release of a person charged with or convicted of an offense. Section 3731 is thus the federal analog of the government's right to appeal, in this case, the trial court's order suppressing evidence supporting the People's case against Lopez.[81] As Justice Marshall explained: "Surely a Government appeal under 18 U.S.C. § 3731 is a 'critical stage' of the prosecution, implicating the Sixth Amendment right to counsel."[82] "As during other critical stages, the defendant needs an attorney during a government appeal

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[81] *Morris*, 17 Cal. App. 5th at 641, citing Cal. Penal Code § 1538.5.
[82] *United States v. Loud Hawk*, 474 U.S. 302, 319 n.2 (1986) (Marshall, J., dissenting).

'as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence.'"[83]

A pre-trial appeal by the prosecutor in state court similarly "hales" the defendant who continues to enjoy the presumption of innocence into court—and implicates the Sixth Amendment right to counsel—even if a post-conviction appeal does not. The Court of Appeal failed to recognize this distinction, and indeed turns it on its head. It stated that "the purpose of the trial court portion of the action is to give the state a forum in which to attempt to overcome the presumption of innocence, while an appeal is *usually* initiated by a convicted defendant who needs counsel *not to protect against being haled into court but to overturn a determination of guilt.*"[84] Yet this case involves a pre-trial appeal by the prosecutor, and thus necessarily involves haling into court an individual who is presumed innocent. "'Appellate review at the request of the People necessarily imposes substantial burdens on an accused, and the extent to which such burdens should be imposed to review claimed errors involves a delicate balancing of the competing considerations of preventing harassment of the accused as against correcting possible errors.'"[85] In other words, as Justice Marshall recognized, an appeal by the prosecutor does involve haling the defendant into court—and "surely" implicates the right to counsel.

Importantly, a pre-trial appeal by the prosecutor occurs at a very different point in the lifespan of a criminal proceeding than a post-conviction appeal by the defendant. As discussed above, criminal defendants have a well-settled right to counsel during the trial phase. A pre-trial appeal by the prosecutor falls squarely within this timeframe. A

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[83] *Id.* (quoting *Ross v. Moffitt*, 417 U. S. 600, 610-611 (1974)).
[84] *Morris*, 17 Cal. App. 5th at 648 (emphasis added).
[85] *People v. Williams*, 35 Cal. 4th 817, 822–23 (2005) (quoting *People v. Superior Court (Howard)*, 69 Cal. 2d 491, 497–498 (1968)).

post-conviction appeal does not. Justice Marshall's conclusion that a pre-trial appeal by the prosecutor implicates the Sixth Amendment right to counsel recognizes this distinction. The Court of Appeal's decision in this case does not.

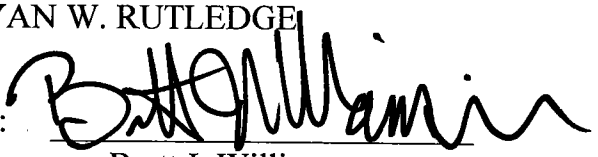
CONCLUSION

"Unfortunately, as one report noted, 'There is no national Innocence Project for the hundreds of thousands of misdemeanor cases that lack DNA evidence.'"[86] The Innocence Project brings to light countless cases of wrongful convictions that should never have happened—but did. Yet that safety net for the legal system cannot catch all of the misdemeanor cases that fall through the cracks. Unless this Court holds that misdemeanor defendants have a right to counsel in appeals by the prosecutor, there will be no one to help these defendants avoid wrongful convictions.

Dated: June 20, 2018.

Respectfully submitted,

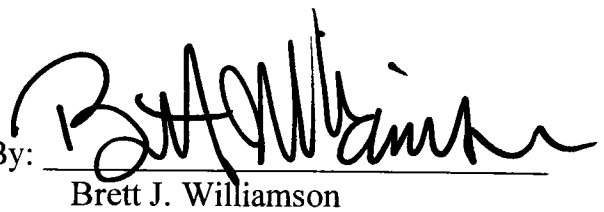
O'MELVENY & MYERS LLP
BRETT J. WILLIAMSON
RYAN W. RUTLEDGE

By: 
Brett J. Williamson
Attorneys for *Amici Curiae*

[86] Roberts, *supra* n.76, at 286 (quoting "*A Race to the Bottom," Evaluation of the Trial-Level Indigent Defense Systems in Michigan*, Nat'l Legal Aid & Defender Ass'n, at 15 (2008)).

CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court 8.204(c)(1) and 8.486(a)(6), counsel for *amici* hereby certifies that the number of words contained in this APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 8,249 words as calculated using the word count feature of the computer program used to prepare the brief.

By: 
Brett J. Williamson

PROOF OF SERVICE

I, Adonna Powell, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 610 Newport Center Drive, 17th Floor, Newport Beach, CA 92660. On June 20, 2018, I served the within document(s):

APPLICATION FOR LEAVE TO FILE AMICI BRIEF AND PROPOSED BRIEF OF AMICI CURIAE THE INNOCENCE PROJECT, THE CALIFORNIA INNOCENCE PROJECT, THE PROJECT FOR THE INNOCENT AT LOYOLA LAW SCHOOL, THE NORTHERN CALIFORNIA INNOCENCE PROJECT, PROFESSOR LARA BAZELON, AND JENNY ROBERTS

☒ by placing the document(s) listed above in a sealed envelope and causing the envelope to be delivered by overnight delivery, by Federal Express, as indicated with the next office day delivery to the office of the addressee(s).

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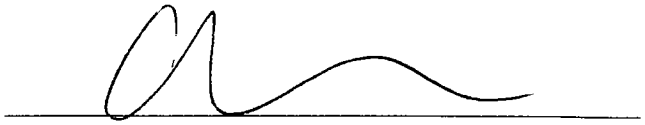
Robert Laurens Drissen Superior Court of California 247 West 3rd Street San Bernardino, CA 92415	Via Federal Express Attorney for Respondent

Attorney General - San Diego Office P.O. Box 85266 San Diego, CA 92186-5266	Via Federal Express Attorney for The People
California Court of Appeal Attn: Clerk of the Court Fourth District, Division Two 3389 12th Street Riverside, CA 92501	Via U.S. Mail

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 20, 2018, at Newport Beach, CA.



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